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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1214

SIDNEY STEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

FRANK G. RAICHLE,
Attorney for Petitioner,
10 Lafayette Square,
Buffalo, New York 14203.

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The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for a writ of certiorari entered on June 26, 1972; (2) granting the petition; and (3) staying the execution of the mandate pending a determination of this application.

The original petition for a writ of certiorari herein was duly filed on March 24, 1972. Such petition was denied by this Court on June 26, 1972. Petitioner submits that subsequent to the filing of his original petition for certiorari and the date hereof an intervening circumstance of substantial and controlling effect has occurred, *i. e.*, the decision of this Court on June 22, 1972 in the case of *Willie Mae Barker v. John W. Wingo*, No. 71-5255, 40 LW 4840.

The case at bar, in the words of the Second Circuit, "raises a serious speedy trial question under the sixth amendment . . ."[1]

The Court of Appeals, in affirming the trial court's refusal to dismiss the case for failure to prosecute and for violation of the petitioner's sixth amendment rights, applied the so-called "demand-waiver rule", whereas this Court in the *Barker* case rejected the demand-waiver rule because "it is insensitive to a right which we have deemed fundamental." This Court then announced that "The approach we accept is a balancing test in which the conduct of both the prosecution and the defendant are weighed" and further that the "balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis." Such an approach in the case at bar will demonstrate that the petitioner Stein was tried in May of 1971 for alleged criminal conduct (Securities Act violations) engaged in in the years 1960 and 1961—ten and eleven years before the trial! When asked by the trial court concerning the reason for the long delay, Government's counsel stated, "I have no explanation for Your Honor" [88a[2]]. The Court of Appeals, *dehors* the record, observed that it has been held in some complex securities cases that time is required for investigation and preparation on the part of the Government but no one, much less the United States attorney, claimed that this was the reason for the long delay in the case at bar.

Under this Court's holding in the *Barker* case if a rehearing of our application for certiorari and a reversal is not deemed to be called for, it is plain that the case should

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[1] Appendix A, annexed to petition for certiorari, p. 14.

[2] Refers to vol. I of appendix to our brief in the Court of Appeals which appendix has been duly certified and filed in this court.

be remanded for a hearing before the trial court to develop the effect of the factors found to be pertinent in the *Barker* case, such as "length of delay"[3], "the reason for the delay"[4], "the defendant's assertion of his right"[5], and "prejudice to the defendant".

In the *Barker* case this Court referred to the fact that a defendant might be denied a speedy trial where "continuances were granted *ex parte*." In the case at bar the following occurred: Defendant's counsel appeared before three different judges in 1968 seeking to set this case for trial and after the case was finally set down for trial on January 6, 1969 appeared at the appointed hour in the designated courtroom to proceed (58a, 72a, 73a). After waiting for approximately one hour on that occasion the judge's law clerk came into the room and announced that the case had been indefinitely postponed. There was no judge present to whom objection could be addressed nor court reporter through whom a record could be made. In the fall of 1970 defendant moved to dismiss for failure to prosecute.

With respect to prejudice the record shows the following: Death of two witnesses, one of whom was a co-defendant and partner of the defendant Sidney Stein and a co-owner of defendant Security Underwriting Consultants, Inc. who died as the trial commenced (181A). Loss of books and records of every investment banking house directly connected with the underwriting which gave rise

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[3] 10 and 11 years between the commission of the alleged criminal conduct and the trial.

[4] As stated, the Government when asked was unable to assign any reason (88a).

[5] Over the years the defendant and his counsel appeared before three different judges in an effort to set the case for trial (58a, 72a, 73a).

to the case (87a, 327, 328, 404, 421, 432, 1152);[6] failing and eroding memories of witnesses (208, 1344).

Conclusion

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays this Court to grant a rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

FRANK G. RAICHLE,
Attorney for Petitioner,
10 Lafayette Square,
Buffalo, New York 14203,
Tel.: 716-852-7587.

Dated: July 5, 1972.

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[6] See particularly 775 where the trial court in excluding certain evidence said:

> "Because there is an inference to be drawn from it which is not supported by the facts and is incapable of refutation because the *government has lost the records.* That's why." (Emphasis ours.)

Certificate of Counsel

As counsel for petitioner I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the ground specified in Rule 58(2).

FRANK G. RAICHLE,
Counsel for Petitioner.